IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPLICATION NO. 5 OF 1998

The Commissioner of Central
Excise, Pune. ... Petitioner.

V/s.

Indian Seamless Steels and
Alloys Ltd. ... Respondent.

WITH

CENTRAL EXCISE APPLICATION NO. 6 OF 1998

The Customs Excise and Gold
(Control) Appellate Tribunal,
West Regional Bench of Mumbai. ... Petitioner.

V/s.

Indian Seamless Steels and
Alloys Ltd. ... Respondent.

R.V.Desai with P.S.Jetly for the petitioners.

D.B.Shroff, senior counsel i/b. Rajesh Shah
& Co. for the respondent.

CORAM : V.C.DAGA AND J.P.DEVADHAR, JJ.

RESERVED ON : 15th September 2005.

PRONOUNCED ON : 13th October 2005.

JUDGMENT : (Per V.C.Daga, J.)

. These reference applications are filed at the instance of Revenue on the ground that substantial question of law arises from the order of the Customs Excise and Gold (Control) Appellate Tribunal, West Regional Bench at Mumbai ("Tribunal"

for short) dated 13th February, 1998, requiring the following question of law to be referred for the considered opinion of this Court:

> "Whether the material handling equipment, tubes and pipes etc. which were neither used in the manufacture of final product nor used for carrying out any process and bringing about change in the final product, will fall under the purview of Rule 57Q of Central Excise Act, 1944 for extending the capital goods credit?"

The Facts :
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2. The question sought to be referred in both these applications is one and the same. A common judgment can dispose of both these applications. However, for the sake of convenience the facts are drawn from Central Excise Application No.5/1998.

3. The respondent-assessee availed credit on capital goods under rule 57Q of the Central Excise Rules, 1944 ("Rules" for short). Three show cause notices dated 6th April, 1995; 25th May, 1995 and 3rd November, 1995 respectively were issued to them alleging therein that credits available on certain capital goods amounting to Rs.1,10,97,930.73 were inadmissible as the subject goods were neither consumed in the manufacture of final product nor

used for carrying out any process to bring about any change in the finished or final product.

4. The Commissioner of Central Excise and Customs, Pune vide his order orders-in-oridinal No.70/CEX/95 dated 31st October, 1995 and No.16/CEX/96 dated 9th February, 1996 confirmed the demands holding that the items enumerated in the show cause notices, on which credit was availed, were neither capital goods consumed as inputs in product nor used in the process of production so as to bring about any change in any product alleged to be the final or finished product, as such those goods would neither qualify to be the capital goods nor were they inputs warranting any advantage of modvat credit under rule 57Q in favour of the respondent-assessee.

5. Being aggrieved by the aforesaid order of the Commissioner, the respondent-assessee had filed appeals before the Tribunal, which were allowed by the Tribunal vide its order dated 1st May, 1997 applying the ratio of various judgments delivered by it, details of which are as under:

1. Order No.1521/97/WRB dated 14th April, 1997 in the case of M/s.Indian Seamless Steels & Alloys Ltd.

2. Order No.1364-66/97/WRB dated 27th March, 1997 in the case of M/s.Kalyani Steels Ltd.

3. Commissioner v. Uttam Engineering, 1996 (86) ELT 498 (T).

4. Jeep Industry v. Commissioner, 1996 (88) ELT 753.

6. Being aggrieved by the aforesaid order of the Tribunal, reference application came to be filed at the instance of the Revenue contending that the Tribunal be directed to refer the question of law raised by them for opinion of this Court.

7. The aforesaid application came to be rejected by the Tribunal vide its order dated 13th February, 1998. Consequently, Revenue has preferred the present application under section 35G(3) of the Central Excise Act, 1944 ("Act" for short) to seek directions against the Tribunal so as to get the aforesaid question referred for the opinion of this Court.

Submissions :
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8. Heard learned counsel for the rival parties. Perused applications with relevant material.

9. Mr.Desai, learned senior counsel appearing for the Revenue submits that the question as to whether or not a particular item falls within a definition of "capital goods" depends upon the user to which it is put to. Mr.Desai has placed reliance on the judgment of the Apex Court in the case of **Commissioner of Central Excise v. Jawahar Mills Ltd.**, 2001 (132) E.L.T. 3 (SC) in support of his submission.

10. Mr.Desai, thus, submits that the assessee must prove that each item, in respect of which modvat credit has been availed, was ‘capital goods’ capable of consumption in the manufacture of final product. In his submission, none of the items mentioned in the subject question would qualify the test of ‘capital goods’ on its capability to get consumed in the process of final product. He submits that none of the goods referred to in the subject question was used as input in manufacture of final product. He, thus, submits that the question needs adjudication at the hands of this Court and, hence, directions to the Tribunal to make reference be issued by allowing these applications.

11. Per contra, Mr.B.D.Shroff, learned senior counsel appearing for the respondent-assessee submits that if the judgment in the case of **Jawahar Mills Ltd.** (supra) is read in its proper perspective, then, each item referred to in the subject question would satisfy the test of capital goods. He has also placed reliance on the aforesaid judgment of the Apex Court in the case of **Jawahar Mills Ltd.** in support of his submission.

12. Mr.Shroff further submits that so far as "material handling equipment" is concerned, there is a judgment of the Apex Court in the case of **M/s.Birla Corporation Ltd. v. Commissioner of Central Excise**, 2005 (186) E.L.T. 266 (SC); directly dealing with the said item, viz., material handling equipment. and treating it as capital goods. According to him, the Apex Court having ruled that the material handling equipment would qualify the test of capital goods as such the very same item involved in the subject question would be entitled to modvat credit.

13. Mr.Shroff, with respect to the remaining two items i.e., tubes and pipes, submits that as found by the Commissioner of Central Excise and

Customs, Pune, the said items were actually used to carry water for cooling inert sphere in their plant as such they were not only capital goods but were used in manufacture of final product as such these two items were rightly held to be entitled to the modvat credit.

14. Mr.Desai, learned counsel for the Revenue in rejoinder did not dispute the user of the said items as found by the Commissioner but urged that mere user is not sufficient. Those items must get directly consumed in the manufacture of final product. He, however, did not dispute that in view of the Apex Court judgment in the case of **M/s.Birla Corporation Ltd.** (supra), the material handling equipment would qualify for modvat credit.

The Issue :
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15. The issue now needs consideration is: whether the subject question involving remaining two items, namely, pipes and tubes needs to be referred to for the opinion of this Court on the face of law laid down by the Apex Court in the case of **Jawahar Mills Ltd.** (supra) relied upon by both parties to the application.

Consideration :
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16. In order to decide the above issue, it is again necessary to turn to the law laid down by the Apex Court in para-6 of its judgment in the case of **Jawahar Mills Ltd.** (supra) which is in the following words:

> "6. The contention of Additional Solicitor General that the aforesaid decision and other decisions referred by the Tribunal in the impugned order were cases involving sales tax and income tax and, therefore, the Tribunal should not have relied on those decisions is without any substance because the real question is that of the principle laid down by a decision. In view of the liberal language of the provision; Mr.Rohtagi fairly and very rightly did; not seriously dispute that if any of the items enumerated in explanation 1(a) is used for any purpose mentioned therein for the manufacture of final products, it would satisfy the test of 'Capital goods'. The main contention of Mr.Rohtagi, however, is that the question whether an item falls within the definition of 'Capital goods' would depend upon the user it is put to. The submission is that parts of the items in respect whereof availing of Modvat credit has been allowed by the Tribunal could not be treated as 'Capital goods' as the manufacturer could not establish that the entire item was used in the manufacture of final product. To illustrate his point, Mr.Rohtagi submitted that part of a cable may go into the machine used by the manufacturer and, thus, may qualify the requirement of clause 1(a) and, at the same time, another part of the cable which is used only for lights and fans would not so qualify. We have no difficulty in accepting the contention of the learned Additional

> Solicitor General that, under these circumstances, user will determine whether an item qualifies or not the requirement of clause 1(a). However, in the present cases in this aspect has no relevance. It was not the case of the revenue at any stage before the authorities that an item does not satisfy the requirement of 'Capital goods' within the meaning of the Rule on the ground of its user as it now sought to be urged by the learned counsel. The case of the revenue has all through been that the items in question per se are not 'Capital goods' within the meaning of the expression as defined in Explanation 1(a). In respect of the cables of which Mr.Rohtagi gave example, the stand of the revenue before the Tribunal was that the cables per se cannot be treated as 'Capital goods'. The stand of the revenue was not as has been projected now by Mr.Rohtagi. In this view, the question of directing remand of these matters for fresh decision by the tribunal does not arise. On the facts and circumstances of these cases, therefore, the stand that the item in question are not used for manufacture of final product cannot be accepted for the reasons afforested.
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> (Emphasis supplied)

17. The aforesaid paragraph, unequivocally, goes to show that the user test is the only test required to be satisfied to find out whether particular goods could be said to be capital goods.

18. Now let us consider the user to which the aforesaid two items i.e. tubes and pipes are put to. Considering their user, found by the

authorities below as described in paras-12 and 13 (supra), it is not possible to say that they were not used in manufacture of the final product as such those goods would fall within the sweep of capital goods. The assimilation of or actual consumption the capital goods into final product is not warranted under the rule. The illustration extracted by the Apex Court from the submission advanced by the learned Additional Solicitor General in the aforesaid para-6 of its judgment in the above case of **Jawahar Mills Ltd.** (supra) is aptly applicable to the two items involved in the subject question viz. pipes and tubes.

19. At this juncture, we may place it on record that Mr.Shroff, learned senior counsel appearing for the respondent-assessee, while reacting to the attempt of Mr.Desai, learned senior counsel appearing for the Revenue to include all other items in the subject question taking advantage of the word "etc.", submitted that this Court should confine its consideration to the subject question vis-a-vis three items only referred to in the question and should not enlarge its scope, especially, when there is no amendment to the subject question, at the instance of the Revenue, in

spite of grant of time to amend the same. In his submission, the word "etc." used in the subject question framed and sought to be raised for reference by the Revenue cannot be used to bring other items within the fold of the subject question.

20. Having appreciated rival submissions, we find much substance in the submission advanced by Mr.Shroff as such we propose to confine our order only to the subject question, wherein only three items, which are specifically referred therein.

21. In view of the law laid down by the Apex Court in the aforesaid two judgments cited supra, we are of the considered opinion that the question sought to be raised needs no adjudication at the hands of this Court. Hence no reference is warranted. The application, thus, does not involve any substantial question of law.

22. In the result, both reference applications are rejected with no order as to costs.

(J.P.DEVADHAR, J.) **(V.C.DAGA, J.)**